United States Department of Labor
Employees' Compensation Appeals Board

F.P., Appellant	)	
and	)	**Docket No. 20-1646**
	)	**Issued: August 3, 2021**
U.S. POSTAL SERVICE, La PUENTE POST OFFICE, La Puente, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 15, 2020 appellant filed a timely appeal from November 13, 2019 and March 30, 2020 merit decisions and an April 9, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than seven percent permanent impairment of his right upper extremity; (2) whether appellant received

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the April 9, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

an overpayment of compensation in the amount of $8,609.23 for the period December 9, 2015 through August 5, 2016, for which he was without fault, as he received schedule award compensation at a percentage greater than to which he was entitled; (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment; and (4) whether OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

FACTUAL HISTORY

On January 11, 2012 appellant, then a 56-year-old letter carrier and truck driver, filed an occupational disease claim (Form CA-2) alleging that he developed a labral tear of the right shoulder and arthritis of the acromioclavicular (AC) joint due to factors of his federal employment, including casing and carrying mail, pushing, pulling, bending, and lifting heavy parcels. OWCP initially denied his claim and on August 20, 2012 accepted right shoulder impingement syndrome. It paid appellant wage-loss compensation on the supplemental rolls from September 20, 2012 through May 3, 2013.

On January 11, 2013 Dr. Roy J. Caputo, a Board-certified orthopedic surgeon specializing in hand surgery, performed a diagnostic and surgical arthroscopy of the right glenohumeral and subacromial space, arthroscopic right shoulder subacromial decompression with bursectomy and excision of coracoacromial ligament, arthroscopic debridement of type-1 labral tear, and arthroscopic distal clavicectomy. He diagnosed right shoulder impingement syndrome, right shoulder AC joint arthritis, questionable right shoulder labral tear, and right shoulder type-1 superior labral tear.

On April 28, 2014 appellant underwent a magnetic resonance arthrogram of the right shoulder, which revealed the acromion process was surgically absent, superior displacement of the humeral head in reference to the glenoid labrum, thinning of the supraspinatus tendon and undersurface tear that appears to be full thickness, and intravasation of contrast material into the superior aspect of the glenoid labrum consistent with a labral tear.

On December 29, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a May 28, 2014 report, Dr. Caputo used the range of motion (ROM) methodology to rate impairment pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He noted that appellant reached maximum medical improvement (MMI). Dr. Caputo diagnosed status post right shoulder arthroscopic subacromial decompression with persistent pain and questionable right should rotator cuff or labral tear. He opined that, pursuant to the ROM method, appellant had five percent permanent impairment of the upper extremity. In an addendum report dated December 10, 2015, Dr. Caputo provided an impairment rating using the sixth edition of the A.M.A., *Guides.*[4] *H*e

[3] A.M.A., *Guides* (5th ed. 2001).

[4] A.M.A., *Guides* (6th ed. 2009).

opined that appellant had eight percent permanent impairment of the right upper extremity pursuant to the ROM method, applying Table 15-34, Table 15-28, Table 15-29, and Table 15-30.

On January 6, 2016 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), noted that appellant's treating physician, Dr. Caputo, used the ROM method for calculating impairment, however, diagnostic-based calculations were required when possible under the A.M.A., *Guides*. He calculated appellant's impairment based on the diagnosis-based impairment (DBI) methodology and found 11 percent permanent impairment of the right upper extremity. Dr. Berman noted that, pursuant to the A.M.A., *Guides* an examiner is instructed to use the method with the highest causally related impairment rating for the impairment calculation and, in this case, the DBI method provided the higher rating.

By decision dated August 2, 2016, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity (right shoulder). The period of the award ran for 34.32 weeks from December 9, 2015 through August 5, 2016 at a weekly compensation rate of $724.46.

On November 11, 2016 Dr. Caputo performed a diagnostic arthroscopy of the glenohumeral and subacromial space, arthroscopic right shoulder biceps tenotomy with debridement of the superior labrum, arthroscopic right shoulder biceps tenodesis, arthroscopic right shoulder rotator cuff debridement and repair, and extensive debridement with synovectomy of the anterior superior glenohumeral joint and scar tissue in the subacromial space. He diagnosed right shoulder superior labral tear with biceps tenosynovitis, rotator cuff tear with fraying of the biceps laxity of the superior labrum, and partial superior surface laminated tear of the supraspinatus.

Appellant subsequently submitted an October 26, 2018 report from Dr. Caputo, who diagnosed status post right shoulder arthroscopy, decompression, biceps tenodesis, and repair of the rotator cuff, healed with residuals. Dr. Caputo referred to the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 15-5 (Shoulder Regional Grid), page 403, the class of diagnosis (CDX) for a rotator cuff injury full-thickness tear was class 1 with a default value of five. He assigned a grade modifier for functional history (GMFH) of two. Dr. Caputo assigned a grade modifier for physical examination (GMPE) of one. He assigned a grade modifier for clinical studies (GMCS) of two. Dr. Caputo utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS – CDX) = (2-1) + (1-1) + (2-1) = +2, which resulted in a grade E or 13 percent permanent impairment of the right upper extremity.

On August 16, 2019 appellant filed a claim for an additional schedule award.

On September 24, 2019 OWCP referred appellant's case to Dr. Jovito Estaris, a Board-certified orthopedic surgeon serving as a DMA, to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*. Referencing the A.M.A., *Guides*,[5] Dr. Estaris calculated the extent of appellant's permanent impairment of the right upper extremity using the

[5] *Id.*

DBI methodology. Referring to the shoulder regional grid, Table 15-5,[6] he identified the diagnosis as a full-thickness rotator cuff tear, class 1, with a default value of five. Referring to Table 15-7 and Table 15-8,[7] Dr. Estaris assigned a GMFH of two for pain of the right shoulder with regular activity. He assigned a GMPE of one for mild limitation of ROM of the right shoulder. Dr. Estaris assigned a GMCS of four based on an arthrogram that revealed rotator cuff tear and labral tear. Applying the net adjustment formula changed appellant's default grade C diagnosis of five percent permanent impairment to a grade E diagnosis, resulting in seven percent permanent impairment of the right upper extremity. Dr. Estaris addressed the discrepancies between his evaluation and Dr. Caputo who found 13 percent upper extremity impairment based on the DBI method and indicated that he believed that Dr. Caputo made a copying error and that the correct impairment is 7 percent right upper extremity impairment. He noted that MMI was October 26, 2018. Dr. Estaris noted that since the previous schedule award was for 11 percent permanent of the right shoulder, and since current impairment rating is also for the right shoulder, "the current impairment rating is INCLUDED in the previous award." (Emphasis in the original.) He concluded, therefore, that "NO ADDITIONAL AWARD INCURRED." (Emphasis in the original.)

By decision dated November 13, 2019, OWCP denied appellant's claim for an additional schedule award. It determined that he had not met his burden of proof to establish greater than seven percent permanent impairment of his right upper extremity, for which he previously received a schedule award. OWCP explained that, as appellant was previously paid a schedule award for 11 percent permanent impairment of his right upper extremity, the medical evidence did not support an increase in the permanent impairment already compensated. It indicated that he received an overpayment for four percent of the right upper extremity and his case would be considered for overpayment of the schedule award.

On December 17, 2019 appellant requested reconsideration and submitted a December 5, 2019 supplemental report from Dr. Caputo. Dr. Caputo concurred in the DMA's rating and further noted that the DMA was correct in noting that his impairment rating provided on October 26, 2018 contained a typographical error. He opined that pursuant to Table 15-5, page 403 of the A.M.A., *Guides*, a class 1 diagnosis of full-thickness rotator cuff injury equates to seven percent right upper extremity impairment. However, Dr. Caputo questioned how a schedule award of 11 percent, issued in 2016, can be rescinded due to expected improvement in appellant's condition as a result of surgery in 2017.

By a decision dated January 21, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In a memorandum dated February 11, 2020, OWCP indicated that a potential overpayment was identified. It noted that appellant had received a schedule award for 11 percent permanent impairment, but upon further development, on October 11, 2019, the DMA found 7 percent permanent right upper extremity impairment. OWCP noted that, since he was originally paid for the 11 percent permanent right upper extremity impairment of $25,807.39, and was only due 7

[6] *Id.* at 403.

[7] *Id.* at 406 and 408, respectively.

percent permanent impairment for the right upper extremity or $17,198.16, he was overpaid $8,609.23.

On February 21, 2020 OWCP informed appellant of its preliminary overpayment determination that he had received an $8,609.23 overpayment of schedule award compensation for the period December 9, 2015 through August 5, 2016. It explained that he had received $25,807.39 for 11 percent permanent impairment of the right upper extremity when he was only entitled to $17,198.16 for 7 percent permanent impairment of the right upper extremity because his condition improved, creating an overpayment for the period December 9, 2015 through August 5, 2016. OWCP also made a preliminary overpayment determination that appellant was without fault in the creation of the overpayment. It advised him that he could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. OWCP provided an overpayment action request form and informed appellant that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that he complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment. OWCP requested that appellant submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised him that it would deny waiver of recovery of the overpayment if he failed to furnish the requested financial information within 30 days. No response was received.

By decision dated March 30, 2020, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant was overpaid compensation in the amount of $8,609.23 for the period December 9, 2015 through August 5, 2016, because he received schedule award compensation for 11 percent permanent impairment of the right upper extremity although the evidence established that he now had 7 percent permanent impairment. He determined that, although appellant was without fault in the creation of the overpayment, the recovery of overpayment was not subject to waiver because appellant had not responded to the preliminary overpayment determination and did not request waiver of recovery of the overpayment. The hearing representative required recovery of the overpayment in full.

On April 2, 2020 OWCP received an overpayment action request form, dated March 25, 2020, in which appellant requested a prerecoupment hearing. Appellant requested waiver of recovery of the overpayment because he was found to be without fault in the creation of the overpayment. He submitted a Form OWCP-20, dated March 25, 2020, which indicated that he had a monthly income of $3,251.17 and monthly expenses of $3,990.37.

By decision dated April 9, 2020, OWCP denied appellant's request for a prerecoupment hearing as untimely filed. It found that, because his request was not filed within 30 days of the February 21, 2020 preliminary overpayment determination, he was not entitled to a prerecoupment hearing as a matter of right.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[8] and its implementing federal regulations, set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[9] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[10]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the presence case reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

The A.M.A., *Guides* also provide that the ROM impairment methodology is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other DBI sections are applicable.[13] If ROM is used as a standalone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.[14] Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[15]

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[8] *Supra* note 1.

[9] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017).

[10] *See K.J.*, Docket No. 19-1492 (issued February 26, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[11] A.M.A., *Guides* 383-492.

[12] *Id*. at 411.

[13] *Id*. at 461.

[14] *Id*. at 473.

[15] *Id*. at 474.

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology *versus* the ROM methodology for rating of upper extremity impairments.[16] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. If the [A.M.A.,] *Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*" (Emphasis in the original.)[17]

The Bulletin further advises:

> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE [claims examiner]."[18]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[19]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than seven percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

OWCP initially awarded appellant 11 percent right upper extremity impairment. On November 11, 2016 appellant underwent additional right shoulder arthroscopy performed by Dr. Caputo. On August 16, 2019 he filed a claim for an additional schedule award.

In support thereof, he submitted an October 26, 2018 report wherein Dr. Caputo diagnosed status post right shoulder arthroscopy, decompression, biceps tenodesis, and repair of the rotator cuff, healed with residuals. He referred to the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 15-5 (Shoulder Regional Grid), page 403, the class of diagnosis for a rotator cuff injury full thickness tear resulted in a class 1 impairment with a default value of five.

[16] FECA Bulletin No. 17-06 (issued May 8, 2017).

[17] *Id.*

[18] *Id.*; *see also H.H.*, Docket No. 19-1530 (issued June 26, 2020); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[19] *Supra* note 9 at Chapter 2.808.6(f); *P.W.*, Docket No. 19-1493 (issued August 12, 2020).

Dr. Caputo assigned a GMFH of two, a GMPE of one, and a GMCS of two. He utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS – CDX) = (2 - 1) + (1 - 1) + (2-1) = +2, which resulted in grade E. Although Dr. Caputo noted 13 percent permanent impairment of the right upper extremity as it related to the right shoulder, on December 5, 2019 he concurred in the DMA's rating noting that the DMA was correct that his impairment rating provided on October 26, 2018 contained a typographical error. He opined that pursuant to Table 15-5, page 403 of the A.M.A., *Guides*, a class 1 diagnosis of full-thickness rotator cuff injury equates to seven percent permanent impairment of the right upper extremity.

In an October 11, 2019 report, Dr. Estaris, serving as a DMA, reviewed the medical evidence of record including Dr. Caputo's October 26, 2018 report and noted that, under the DBI methodology for a rotator cuff tear with residual loss, the most that appellant could be awarded was seven percent permanent impairment of the right upper extremity. Using the DBI rating method, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1, grade C, impairment with a default value of five percent. Dr. Estaris calculated a GMFH of two, GMPE of one, and GMCS of four. He utilized that the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2-1) + (1-1) + (4-1) = +4, which he indicated resulted in a grade E or seven percent permanent impairment of the right upper extremity.[20] Dr. Estaris further calculated appellant's impairment using the ROM method Table 15-34, page 475 and zero percent permanent impairment.[21]

The Board finds that Dr. Estaris, serving as DMA, explained with rationale how he arrived at his conclusion that appellant sustained seven percent permanent impairment of the right upper extremity under the A.M.A., *Guides*.[22] As the record contains no other probative, rationalized medical opinion that, supports he had greater impairment of the right upper extremity based upon the A.M.A., *Guides*, he has not met his burden of proof to establish greater than seven percent permanent impairment of the right upper extremity for which he received schedule award compensation.[23]

[20] *See* A.M.A., *Guides* (6th ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

[21] Dr. Estaris noted Dr. Caputo's ROM findings of the right shoulder for flexion 140 degrees for three percent impairment, abduction 140 degrees for three percent impairment, external rotation 60 degrees for zero impairment, and internal rotation 50 degrees for two percent impairment. Findings for the unaffected left shoulder for flexion 160 degrees for three percent impairment, abduction 160 degrees for three percent impairment, external rotation 70 degrees for zero impairment, and internal rotation 70 degrees for two percent impairment. The ROM method resulted in zero impairment. *See* A.M.A., *Guides*, 15.7a Clinical Measurements of Motion, Assessing Motion, page 464, which provides that both extremities should be examined whenever possible, since the right vs. left comparisons between the affected and unaffected side are useful to help determine the "normal" baseline.

[22] *See O.F.*, Docket No. 19-0986 (issued February 12, 2020); *K.J.*, Docket No. 19-0901 (issued December 6, 2019).

[23] *See J.H.*, Docket No. 18-1207 (issued June 20, 2019).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA[24] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.[25] Section 8129(a) of FECA provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[26]

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.[27] Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.[28]

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of $8,609.23, for which he was without fault, for the period December 9, 2015 through August 5, 2016.

In the present case, appellant received $25,807.39 in schedule award compensation for 11 percent permanent impairment of his right upper extremity. However, for the reasons explained above, he was only entitled to receive $17,198.16 in schedule award compensation for seven percent permanent impairment of his right upper extremity. The difference between these two amounts, $8,609.23, constitutes an overpayment of compensation. As noted above, OWCP's procedures allow for the declaration of such an overpayment as both awards were calculated under the same edition of the A.M.A., *Guides*. Therefore, OWCP properly determined that appellant received an $8,609.23 overpayment.

[24] *Supra* note 1.

[25] 5 U.S.C. § 8102(a).

[26] *Id.* at § 8129(a).

[27] *Supra* note 9 at Chapter 2.808.9(e) (February 2013).

[28] *Id. See also W.M.*, Docket No. 13-0291 (issued June 12, 2013).

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.[29] Section 10.438 of OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.[30]

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.[31] However, appellant had the responsibility to provide financial information to OWCP[32] and failed to do so.

In its preliminary overpayment determination, dated February 21, 2020, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support income and expenses. It advised that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant did not provide a completed Form OWCP-20 or submit financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

Accordingly, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 4

OWCP's regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.[33] The date of the request is determined by the postmark or other

[29] 5 U.S.C. § 8129.

[30] 20 C.F.R. § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

[31] *Id*. at § 10.436.

[32] *Id.* at § 10.438; *S.P.*, Docket No. 19-1318 (issued July 31, 2020).

[33] *Id*. at § 10.432; *see S.O.*, Docket No. 20-0753 (issued October 28, 2020); *E.M.*, Docket No. 19-0857 (issued December 31, 2019); *D.H.*, Docket No. 19-0384 (issued August 12, 2019).

carrier's date marking.[34] Failure to request the prerecoupment hearing within 30 days constitutes a waiver of the right to a hearing.[35] The only right to a review of a final overpayment decision is with the Board.[36] The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.[37]

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

OWCP issued a preliminary overpayment determination on February 21, 2020. It advised appellant that he had 30 days from that date to request a prerecoupment hearing.

On April 2, 2020 OWCP received an overpayment action request form, dated March 25, 2020, with no legible postmark, in which he requested a prerecoupment hearing. The timeliness of a request for a prerecoupment hearing is determined by the postmark date or other carrier's marking showing when the request was sent to OWCP.[38] As appellant's request for a prerecoupment hearing was dated March 25, 2020, more than 30 days after the February 21, 2020 preliminary overpayment determination, it was untimely filed. Therefore, OWCP properly denied his request for a prerecoupment hearing as untimely filed.[39]

The Board further finds that, as appellant's request form was mailed to OWCP's Branch of Hearings and Review, it was properly treated as a request for a hearing. As noted, the hearing provisions of section 8124(b) are not applicable to final overpayment decisions. OWCP's regulations provide that, when a final overpayment decision is issued, there is no right to a hearing or a review of the written record, and OWCP does not have discretion to grant such a request.[40] The only right to appeal is with the Board.[41]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than seven percent permanent impairment of his right upper extremity, for which he previously received

[34] *Id*. at § 10.439, 10.616(a); *see A.B.*, Docket No. 18-1172 (issued January 15, 2019); *see also B.W.*, Docket No. 18-1004 (issued October 24, 2018); *C.R.*, Docket No. 15-0525 (issued July 20, 2015).

[35] *Id.*

[36] 20 C.F.R. § 10.440(b).

[37] 5 U.S.C. § 8124(b); *see G.L.*, Docket No. 19-0297 (issued October 23, 2019).

[38] *A.B.*, Docket No. 18-1172 (issued January 15, 2019).

[39] *See A.B.*, *id.*; *E.V.*, Docket No. 17-1328 (issued December 11, 2017); *see also R.U.*, Docket No. 16-0027 (issued March 24, 2017).

[40] *Supra* note 36.

[41] 5 U.S.C. § 8124(b); *see S.O.*, *supra* note 33; *G.L.*, *supra* note 37.

a schedule award. The Board also finds that OWCP properly determined that he received an overpayment of compensation in the amount of $8,609.23 for the period December 9, 2015 through August 5, 2016, for which he was without fault and properly denied waiver of recovery of the overpayment. The Board further finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the April 9 and March 30, 2020 and November 13, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 3, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board